SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71-4621

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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The Petitioner, Glenn W. Bricker, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Hampshire entered in case No. 6156a.

OPINION BELOW

The opinion of the Supreme Court of New Hampshire, not yet reported, appears in Appendix A hereto. The opinion of the court of first instance, the Superior Court of New Hampshire, appears in Appendix B.

JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered on July 29, 1971, Appendix A below. 1/ A timely motion for rehearing was denied on August 31, 1971,

1/ Under New Hampshire practice the opinion of the Supreme Court ending in the notations "Exceptions overruled; Petition Dismissed" along with the denial of the motion for rehearing, constitutes the judgment.

and timely motions to remand to the Superior Court for the taking of further testimony, filed on June 1, 1971, and August 9, 1971, were respectively denied on July 20 and August 31, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Is a state chartered private charitable hospital corporation, operating as the only hospital in the community or within a 25 mile radius, so linked with the state by being financed, in part, by local government contributions, Hill-Burton construction funds and Medicare, that the Fourteenth Amendment imposes due process limitations on its removal of the tenure status of physicians who are members of its staff?

2. Is the tenured staff physician of such a hospital denied due process when the hospital refuses to give him notice of charges against him either before or during the hearing on which the removal action will be based?

3. Is the physician denied due process when the hearing body receives and considers, on the question of his fitness to retain tenure, evidence of the fact that he testifies for plaintiffs in medical malpractice actions?

4. Is the physician denied due process when the substance and findings of such hearing are reported only orally to the separate body which determines his tenure and when that body then ends his tenure without a statement of reasons therefor?

5. Is the physician denied due process when, in seeking injunction in the state courts against the hospital's ending of his tenure, the courts accept as evidence on the merits of the case testimony as to specific acts of his alleged misconduct which were unmentioned in the hospital's proceedings and were not specially pleaded in court by the hospital?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is a physician, qualified for membership on the "active staff" of the respondent, a privately incorporated charitable hospital and the only hospital within a radius of about twenty-five miles. Appointments to the active staff are made annually. In October, 1970, after petitioner had been a member for several years, he was denied reappointment. In this litigation he complains against respondent's proceedings which led to this denial.

Under the Hill-Burton Act (60 Stat. 1041 (1946) as amended, 42 U.S.C. 291 et seq.) respondent has received substantial federal aid in the construction and expansion of its building. It also receives funds voted by nearby local governments under state enabling legislation, New Hampshire Revised Statutes Annotated 31:4-VI.

Although active staff members' appointments are only for a year at a time, respondent's bylaws give important tenure protection. The appointing body, the lay Board of Directors, may fail to reappoint a member only on recommendation of both the active staff itself and the staff credentials committee, (a distinct body whose membership, by by-law, is identical with the active staff). In 1970, the staff and committee each consisted of ten members, including petitioner. Further, a physician receiving an unfavorable recommendation from staff and committee is entitled to a hearing before the joint conference committee of the directors and staff; the latter committee must report to the directors before the reappointment can be denied.

In August, 1970 the active staff voted against petitioner's reappointment. The credentials committee took the same action a few days later at a meeting of which petitioner, a member, received no notice. However, respondent notified petitioner that his non-reappointment had been recommended, and advised him of his hearing rights before the joint conference committee.

Petitioner requested the hearing, which was then duly scheduled, and he also requested an advance specification of the charges against him. The latter request was refused and no statement of complaints against his conduct or qualifications was given him by respondent either before or at the hearing, although individual members of the directors and staff made complaints against him at the hearing itself. No reason was then given for refusing the specification of charges but respondent's lay president later testified (Exhibit 10, pages 47-48:)

"Dr. Bricker, in a phone conversation, at least, asked me

what the particular charges were, which I construed to be asking, in a sense, of giving him a list against, for which he could erect a defense, I guess you might say, and this certainly was not my idea of how the meeting should be conducted. He was, in general, aware of the situation that was becoming, what we call was untenable there, and his disruptive influence among the other doctors, and to give him a bill of particulars or try to conduct this in any legal court fashion was not our intention. It was simply to get at the basic elements of the matter and the dissension between the other doctors and himself and whether or not he was, in general, good for the hospital or bad for the hospital. It was not intended to be conducted by any rules that are generally applicable to the courtroom rules."

The hearing on October 14, 1970, lasted several hours and consisted mostly of petitioner's attempts first to learn the specifics of the complaints against him and then refute, on the spot, those that were stated.

Complaints presented against petitioner at the hearing, as well as later testimony presented by the respondent in the present litigation, included objections to his practice of testifying for plaintiffs in medical malpractice actions.

Following the joint conference committee hearing, the committee voted not to renew petitioner's appointment, but did not specify reasons. The president and vice president of respondent, both of whom were members of the committee, reported orally to the board of directors on the reasons for the recommendation (Exhibit 5-B). The board voted to end petitioner's appointment, and the president notified him of this by letter on October 20, 1970, again without specification of reasons (Exhibit 4-G.)

Petitioner immediately sought temporary and permanent injunctions against respondent in the Superior Court, alleging that he had been denied "due process of law" in respondent's proceedings. The court issued a temporary injunction on December 1, 1970 (see Reserved Case).

Upon hearing on the merits of the petition for permanent injunction the Superior Court dismissed the petition. Over timely objection by the petitioner, the court had considered evidence of complaints against petitioner which had neither been presented at the joint conference committee hearing, nor specially pleaded by respondent, nor otherwise formally presented to him.

Under New Hampshire practice, petitioner's exceptions were reserved to the New Hampshire Supreme Court (see Reserved Case) which overruled them.

While agreeing that no specification of charges was given petitioner at any time after non-reappointment proceedings began in August 1970, the Superior Court found that "his objectionable actions were adequately made known to him by formal and informal discussions with him for a long period prior to the October 14, 1970 hearing. (Appendix B.) The Supreme Court of New Hampshire described this notice as "by formal notifications and informal discussions", (Appendix A.) but the petitioner submits that to the extent that the record permits any finding of such notice, it does not meet Fourteenth Amendment standards. The only earlier formal notices to petitioner of any significance were:

(1) A letter threatening to end his appointment if an incident similar to a clash between him and the chief nurse in the spring of 1970 should again occur (the record shows that the directors had tried and con-

victed the petitioner of fault in this incident, in absentia and without notice; no recurrence of such an incident prior to the non-reappointment proceedings is alleged);

(2) A formal warning early in 1970 regarding his arrearages in keeping records of his patients' cases;(no arrearage was claimed to exist at the time of his non-reappointment);and

(3) A letter sent to petitioner six years earlier (July 14, 1964), conditioning his continued staff status on his harmonious working with the respondent's personnel and staff. (Two years later respondent advanced petitioner to active staff from the less privileged "courtesy staff".)

Aside from these remote formal notices, respondent has shown no more than that various staff members and personnel have, at unspecified times, made various complaints to petitioner about his conduct, orally or in some other informal manner.

HOW FEDERAL QUESTION IS PRESENTED

Petitioner, a physician, after being refused in repeated attempts to engage counsel for what the Superior Court recognized to be an unpopular cause (Exhibit 7, pages 157 and 159), originally appeared pro se, preparing and presenting his own "Petition for Injunction" and "Motion to Amend Petition for Injunction" (see Reserved Case). He claimednot only specific violations by respondent of its by-laws (paragraphs 11, 19 and 21), but also violations of his rights to "due process of law" (paragraphs 22 and 25) for the several reasons set forth in other paragraphs.

The Supreme Court of New Hampshire has on several occasions construed the words "due process" or "due process of law" as implying and carrying the sense in which they are used in the Fourteenth Amendment. See Corning Glass Works v.

Max Dichter Co. 102 N.H. 505, 509, 161 A.2d 569 (1960); Opinion of the Justices, 66 N.H. 629, 633, 33 A.1076 (1891); and In re Mundy 97 N.H. 239, 241 (and dissenting opinion at page 247), 85 A.2d 371 (1952). Although the New Hampshire Constitution has no "due process" clause using those words, its phrase "law of the land" (Constitution of 1783 as amended, Part I, art. 15th) has been construed in the cited decisions to carry the same effect as the Fourteenth Amendment's due process clause.

After petitioner had engaged counsel and before hearing on the merits, a further "Motion to Amend Petition for Injunction" was filed (Reserved Case), alleging respondent's receipt of public funds, both federal and local, to emphasize that State action under the Fourteenth Amendment was involved.

In its opinion with decree (Appendix B), the Superior Court recognized that petitioner particularly claimed a denial of "due process in not being given a statement of the charges to be made against him", and rejected this claim in its dismissal of his petition. Requests for rulings of law substantially covering the due process claim were denied by the court; see Reserved Case, Plaintiff's Requests for Findings of Fact and Rulings of Law, page 3 and 4, requests Nos. 2 (b), 8 and 10, and ruling thereon in Appendix B.

The Supreme Court of New Hampshire also expressly entertained petitioner's due process claim (Appendix A page 17) based on respondent's refusal to specify charges to him, and rejected the claim.

Finally, the Fourteenth Amendment basis of petitioner's claims was renewed in his "Motion for Rehearing" to the Supreme Court of New Hampshire (see certified record from that court) and its assertion by petitioner throughout the

litigation was expressly acknowledged on Page 3 of respondent's "Answer to Plaintiff's Motion for Rehearing" (certified record of the New Hampshire Supreme Court).

REASONS FOR GRANTING THE WRIT

I THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT SUSTAINS RESPONDENT'S DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS WITHOUT NOTICE OF CHARGES, IN CONFLICT WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

Fourteenth Amendment protections apply to staff appointment and removal procedures at state chartered private hospitals like the respondent which receive substantial federal construction assistance under the Hill-Burton Act and operating and capital gifts from local government bodies. Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A., 4th Circuit, (1963), cert. den. 376 U.S. 938; Eaton v. Grubbs, 329 F.2d 710 (C.A., 4th Circuit, 1964); Cypress v. Newport News General & Nonsectarian Hosp. Ass'n., 375 F.2d 648 (C.A. 4th Circuit, 1967); Sams v. Ohio Valley General Hosp. Ass'n., 413 F.2d 826 (C.A., 4th Circuit, 1969); Foster v. Mobile County Hospital Board, 398 F.2d 227 (C.A. 5th Circuit, 1968), 37 ALR 3d 637. Each of these cases, it should be noted, involves the equal protection clause rather than the due process clause of the Fourteenth Amendment.

Due process in an administrative hearing implies the right to notice, and the right to notice implies a statement of charges in sufficient detail and sufficiently in advance of hearing to permit the preparation of a defense. While there is no simple formula

to determine in advance the adequacy of notice under the due process clause in all situations, its adequacy must be judged, at least in part, against the relative difficulty or ease to the party giving notice of providing a full and adequate statement of the essentials of the matter to be considered, and the relative importance or unimportance of the matter to the party receiving the notice. Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Goldberg v. Kelley, 397 U.S. 254 (1970); Drown v. Portsmouth School District, 435 F.2d 1182 (C.A., 1st Circuit, 1970).

The petitioner submits that he, no less than the welfare recipients in the Goldberg case, is entitled under the Fourteenth Amendment to "timely and adequate notice detailing the reasons for a proposed termination" (397 U.S. 267 - 268). See also Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (C.A., 5th Circuit, 1971) on the applicability of the due process clause to medical staff appointments.

It is further submitted that the conduct of both the respondent, in basing its action on charges of which petitioner had no notice before the hearing, and the New Hampshire courts in affirming the respondent's action after accepting proof of additional charges which were not specially pleaded, further violate petitioner's Fourteenth Amendment due process rights as established by this court in Re Ruffalo 390 U.S. 544 (1968).

In summary, petitioner's staff status with respondent, as a hospital substantially aided by federal and local governments, is well within the scope of Fourteenth Amendment protections against state action under the principle followed in the Simkins case (supra) and other cases cited from the Courts of Appeals in the Fourth and Fifth Circuits. The Supreme Court of New Hampshire has here, in a situation within the scope of Fourteenth

Amendment limitations, decided a substantial question of due process against the party claiming the protection of that right and against the due process principles set forth by this Court in Re Ruffalo and Goldberg (supra). The national scope of the Hill-Burton Act and the thousands of physicians and hospitals presently involved in staff membership relationships such as that which petitioner claims for himself here are factors to suggest that the discrepancy in the application of these principles between the Supreme Court of New Hampshire and the courts in the federal jurisdiction might now appropriately be corrected.

II THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND OTHER CONSTITUTIONAL PROVISIONS BECAUSE IT SUSTAINS RESPONDENT'S DEPRIVATION OF PETITIONER'S TENURED STAFF STATUS FOLLOWING HEARING AT WHICH EVIDENCE OF PETITIONER'S TESTIMONY IN MEDICAL MALPRACTICE CASES PER SE WAS ACCEPTED AS A SUBSTANTIAL CHARGE AGAINST HIM.

Question 3 presented here (page 2 above) is an important although subsidiary matter. It is submitted that for the respondent and the Superior Court to have accepted as valid complaints against petitioner's tenure the fact that he testifies as an expert witness for plaintiffs in medical malpractice actions, and to have justified their decisions against petitioner, in part, on the basis of that activity (with no showing that the testimony he gives is in any way improper per se), violates petitioner's rights under the equal protection and due process clauses of the Fourteenth Amendment and his rights of free speech under the First Amendment, not to mention the fact that it raises serious questions in regard to the administration

of the courts. Particularly, for the respondent and the courts to discriminate against the petitioner as a medical expert witness would appear to constitute an unjustifiable classification of him. See Sams v. Ohio Valley General Hosp. Ass'n. (supra).

III PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED BY THE DIVISION BETWEEN RESPONDENT'S HEARING AND DECIDING BODIES.

Question 4 (page 2 above) presents several further subsidiary due process matters. Since respondent kept no record of the proceedings and discussion at the joint conference committee hearing of October 14, 1970, and only an oral report was made to the deciding body, the board of directors, and since the board then ended petitioner's tenure without a statement of reasons, his Fourteenth Amendment rights have been violated. Morgan v. United States, 298 U.S. 468 (1936). Drown v. Portsmouth School District (page 10, supra).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Hampshire.

Respectfully Submitted,

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September 29, 1971

APPENDIX A.

Grafton, No. 6156-a. Opinion of Supreme Court of New Hampshire

GLENN W. BRICKER, M.D.

v.

SCEVA SPEARE MEMORIAL HOSPITAL

Decided July 29, 1971

Snierson, Chandler & Copithorne (Mr. John P. Chandler orally) for the plaintiff and the town of Ashland, amicus curiae.

Wescott, Millham & Dyer (Mr. Peter V. Millham orally) for the defendant.

PER CURIAM. This is a bill in equity brought by a physician to enjoin a hospital from enforcing its decision not to reappoint him to the hospital's medical staff. Originally the petition was brought pro se by the plaintiff and a temporary injunction on the pleadings was denied by King, J. This order was sustained by this court on October 26, 1970. Bricker v. Sceva Speare Hosp., 110 N.H. 412, 270 A. 2d 358. On December 1, 1970, King, J., after an evidentiary hearing, issued a temporary injunction ordering the defendant to permit plaintiff the customary access of a medical staff member to the facilities of the hospital. Present counsel for the plaintiff entered the case originally for the town of Ashland, as amicus curiae and appeared for the plaintiff midway through the temporary injunction hearing.

On May 17, 1971, the Trial Court (Johnson, J.), after hearing, dismissed the petition of the plaintiff but stayed the discharge of the temporary injunction pending an appeal to this court. The plaintiff's exceptions were reserved and transferred by the trial court. The record includes the transcript of the hearing on the temporary injunction which was admitted in evidence at the trial on the merits.

Dr. Bricker came to Ashland from Pennsylvania in early 1963, and is the only physician practicing there. The Sceva Speare Memorial Hospital is located in Plymouth about six miles from Ashland. The next nearest hospitals to Ashland are in Franklin and Laconia, both about twenty-five miles away. The Sceva Speare Hospital serves an area population of about twelve thousand. At the time this action was brought there were ten physicians on the active medical staff, including Dr. Bricker. All of the active medical staff, with the exception of Dr. Bricker and a pathologist from Laconia, were residents of Plymouth.

The defendant hospital is organized as a charitable corporation with a president and the usual officers including a board of directors of not less than eighteen nor more than twenty-four. In addition to certain special classifications such as consulting staff not germane to this case the medical by-laws provide for two classes of physicians entitled to hospital privileges. These are courtesy medical staff and active medical staff. Courtesy medical staff members are physicians eligible for active staff membership by qualification but either first year members of the staff or otherwise ineligible for appointment to the active medical staff. Courtesy members are eligible for appointment to the active staff after one year. The bylaws provide that staff appointments shall be made by the board of directors for terms of one year on recommendation of the active medical staff prior to June 30th of each year. The credentials committee is made up of the active medical staff and charged with the duty of recommending the privileges to be extended to individual staff members and reviewing all staff appointments annually. Surgical privileges vary with individual physicians but no physician may treat a patient in the defendant hospital who is not a staff member.

Dr. Bricker was appointed to the courtesy staff on February 4, 1963 and to the active staff in June of 1966. He was reappointed in 1967, 1968 and 1969. The annual meeting of the medical staff in1970 was not held until August 21, 1970. Dr. Bricker received a notice of this meeting but was hospitalized in the Laconia Hospital due to an accident and unable to attend the meeting. The remainder of the active staff present at the August 21st meeting voted to recommend reappointment of all the active staff except Dr. Bricker. This recommendation was adopted by the board of directors at their meeting on August 24, 1970, together with a direction that Dr. Bricker be notified of the action and his right of appeal under the bylaws.

The medical bylaws provide that where reappointment is not recommended, the physician concerned shall be given "an opportunity of appearing before the Credentials Committee and Joint Conference Committee in joint session." Dr. Bricker requested a hearing and appeared before the credentials committee and the joint conference committee on October 14, 1970.

The joint conference committee consists of the president and vice-president of both the medical staff and the board of directors together with the administrator as an ex officio member. The meeting of October 14th appears to have been attended by all persons entitled to, including Dr. Bricker. During the meeting, which lasted some three and one-half hours, Dr. Bricker questioned each member of the active medical staff individually and learned that they were unanimous in opposing his reappointment. Some members of the staff gave their reasons for opposing him and others refused. The president of the hospital notified Dr. Bricker by letter dated October 20, 1970 that the board of directors had again voted

unanimously not to reappoint him to the medical staff and the present action followed.

The initial question is the extent that the exclusion of a physician from staff privileges in a hospital is subject to review by the courts. Generally courts have drawn a distinction in such cases between public and private hospitals. See Annot., 37 A.L.R. 3d 645 (1971); The Physician's Right to Hospital Staff Membership: The Public-Private Dichotomy, Wash. U.L. Q. 485 (1966). In the present case the acceptance of federal and town funds in addition to private contributions and income from patient care has not changed the private character of the defendant hospital. Woodward v. Porter Hosp., Inc., 125 Vt. 419, 217 A. 2d 37 (1966); Khoury v. Community Memorial Hosp., Inc., 203 Va. 236, 123 S. E. 2d 533 (1962); Shulman v. Washington Hosp. Center, 222 F. Supp. 59 (1963).

In the case of private hospitals some courts have applied the same limitations generally applicable to actions against private societies (see Bricker v. New Hampshire Medical Society, 110 N.H. 469, 470, 272 A. 2d 614, 616 (1970))and held that the exclusion of a physician from staff privileges rests within the discretion of the hospital authorities and is not subject to review by the courts. Levin v. Sinai Hospital, 186 Md. 174, 46 A. 2d 298 (1946); Annot., 37 A.L.R. 3d 645, 659, § 3 (1971). More recently courts have recognized that the public has a substantial interest in the operation of private hospitals and that of necessity in the public interest some measure of control by the courts is called for. This has led to a rule that exclusion from staff privileges must be done in accordance with the bylaws of the hospital (Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 395 Pa. 257, 149 A. 2d 456 (1959); Joseph v Passaic Hosp. Ass'n, 26 N.J. 557, 141 A. 2d 18 (1958))and will be reviewed by the courts and

set aside if arbitrary, capricious or unreasonable. Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A. 2d 817 (1963); Davidson v. Youngstown Hosp. Ass'n, 19 Ohio Ct. App. 2d 246, 250 N.E. 2d 892 (1969); Woodward v. Porter Hosp., Inc. supra; Annot., 37 A.L.R. 3d 645, 661 s. 3(b).

The hearing accorded Dr. Bricker was found by the trial court to be substantially in accordance with the bylaws and gave him an opportunity to question the credentials committee and state his reasons why he should be reappointed. The plaintiff argues that he was denied due process by this procedure since he was not given a statement of the charges against him prior to the hearing. The trial court found that Dr. Bricker's objectionable actions were adequately made known to him by formal notifications and informal discussions for a long period prior to the hearing and these actions were adequately reviewed at this meeting. The evidence supported this finding and that the hearing accorded the plaintiff a fair opportunity to urge reconsideration of the board's action. "All that is required is for the board to be fully informed so that it may make an intelligent and reasonable judgment in good faith. . . . "Sussman v. Overlook Hosp. Ass'n, 95 N.J. Super. 418, 425, 231 A. 2d 389, 393 (1967).

The plaintiff urges that it was error for the trial court not to limit the evidence introduced before it to matters presented to the joint conference committee and the credentials committee. The issue before the court was similar to that in zoning appeals where the court is concerned with whether the action of a zoning board of adjustment was "unjust and unreasonable." It has been held the court may properly in those cases consider additional evidence not presented to the board to assist it in evaluating the action of the board (Sweeney v. Dover, 108 N.H. 307, 234 A. 2d 521 (1967);

Vannah v. Bedford, 111 N.H. , 276 A. 2d 253 (1971)) and the same is the rule in this case.

It is clear from the testimony and the findings of fact made by both King, J. after hearing on the preliminary injunction and Johnson, J. in the dismissal of the action that objections to the professional competency of the plaintiff were not a major factor in his nonreappointment. In his findings of fact, Johnson, J. states the reasons as follows: "The Court finds as a fact that Dr. Bricker has been a disruptive force at the Sceva Speare Memorial Hospital; that he has acted in a way detrimental to the best interests of the institution; that he has acted in a way which is detrimental to the good practice of medicine by other members of the Medical Staff of the Hospital; that he has acted in a way which is disruptive to the nurses and other administrative staff of the Hospital; that he has conducted his personal life in such a way as to cause great personal concern and anxiety to the other members of the Medical Staff and the Directors of the Hospital; and that his actions have had, in general, an adverse effect upon the smooth-working relationships so necessary for adequate and essential health care. Finally, the Court finds that Dr. Bricker has conducted his medical practice, on occasion, in a way that could at best be described as unwise and at worst as highly unprofessional . . ."

The evidence which was extensive and included testimony by four members of the medical staff, the lay president and vice-president of the board and the administrator supports these findings. On the basis of these findings the trial court found that the action of the defendant in not reappointing Dr. Bricker was neither arbitrary nor capricious and was reasonable under all the circumstances.

The denial of hospital privileges to the plaintiff under the circumstances of this case seriously affects the ability of the plaintiff to practice medicine in the town of Ashland. The town of Ashland is deprived of effective medical service by the failure of the board to reappoint the plaintiff. The board on the other hand had a primary duty to maintain the hospital for service to all the public in its area including the town of Ashland. Where as in this case the staff is small a disruptive member is more destructive of efficiency than in the case of a large staff where doctors work less frequently together and on a less personal basis. The other physicians on the staff were unanimous in their testimony that his presence on the staff was disruptive of the hospital and the medical staff. The court found that the plaintiff was an active disruptive force on the hospital operation. Weighing the respective interests the court thus concluded that the board was justified in refusing to reappoint the plaintiff to protect and preserve the hospital. See Glass v. Doctors Hosp., Inc., 213 Md. 44, 131 A. 2d 254 (1957); Hagan v. Osteopathic Gen. Hosp., 102 R.I. 717, 232 A. 2d 596 (1967).

The evidence supports the trial court's finding that defendant's actions were not arbitrary, capricious or unreasonable and the decree dismissing the action is sustained.

The motion to remand for the taking of further testimony is denied. The additional affidavits filed in this court are merely cumulative to other affidavits already considered by the trial court in denying plaintiff's motion for a new trial.

Exceptions overruled; petition dismissed.

APPENDIX B.

Opinion of the Superior Court of New Hampshire

Grafton
Equity No. 11,397

GLENN W. BRICKER, M.D.

v.

SCEVA SPEARE MEMORIAL HOSPITAL

DECREE

This is a petition brought on behalf of Dr. Glenn W. Bricker to enjoin the Board of Directors of the Sceva Speare Memorial Hospital of Plymouth, New Hampshire, from removing him as a member of the Medical Staff of said Hospital.

On August 21, 1970, the Medical Staff and Credentials Committee (they being one and the same) of the Hospital met and voted to not recommend the reappointment of Dr. Bricker. Dr. Bricker was given notice of this meeting in the usual fashion, that being a post card from a member of the Hospital staff, but he was unable to attend because he was personally ill and was a patient at the Lakes Region General Hospital. On August 24, 1970, the Credentials Committee again met and voted unanimously to not recommend the reappointment of Dr. Bricker to the Board of Directors of the Sceva Speare Memorial Hospital. On August 25, 1970, Dr. Bricker was informed of this action and his right of appeal by Mr. Beaulieu, Hospital Administrator.

Dr. Bricker met with the Joint Conference Committee and Credentials Committee on October 14, 1970, and the charges against him were discussed. He had not received written specifications before this meeting as he had re-

quested, but in view of all of the circumstances, the Court finds that he was given a fair appeal procedure.

The Board of Directors of the Hospital met on October 19, 1970, and accepted the recommendation of the Joint Conference Committee that Dr. Bricker not be reappointed as a member of the Medical Staff. On October 20, 1970, Mr. Wadleigh, Hospital President, wrote Dr. Bricker informing him of this action.

Dr. Bricker later brought this action to enjoin the Board from dismissing him in which he claims, essentially, that:

(1) The published procedures of the Hospital were not followed in dismissing him; and that, in particular, he was denied due process in not being given a statement of the charges to be made against him prior to the action of the Medical Staff, Credentials Committee and the Board of Directors.

(2) That the action of the Medical Staff, Credentials Committee and the Board of Directors of the Sceva Speare Memorial Hospital is arbitrary, capricious and unreasonable.

Dr. Bricker first appeared pro se before Justice John W. King asking for an ex parte order to reinstate him at the Hospital. This request was denied. Dr. Bricker then brought an appeal to the Supreme Court which returned the case to the Grafton County Superior Court for hearing on the temporary injunction. By this time the September Term of the Grafton County Superior Court had ended and Justice King was holding Court in Coos County. The hearing was therefore held in the City of Berlin.

After a two-day hearing before Justice King, the transcript of which has been entered as evidence in the within

trial, Justice King ordered Dr. Bricker reinstated at the Hospital pending the hearing on his prayer for a permanent injunction. This present hearing was held on Tuesday and Wednesday, the 4th and 5th of May of this year.

The Court finds as fact that Dr. Bricker has been a disruptive force at the Sceva Speare Memorial Hospital; that he has acted in a way detrimental to the best interests of the institution; that he has acted in a way which is detrimental to the good practice of medicine by other members of the Medical Staff of the Hospital; that he has acted in a way which is disruptive to the nurses and other administrative staff of the Hospital; that he has conducted his personal life in such a way as to cause great personal concern and anxiety to the other members of the Medical Staff and the Directors of the Hospital; and that his actions have had, in general, an adverse effect upon the smooth-working relationships so necessary for adequate and essential health care. Finally, the Court finds that Dr. Bricker has conducted his medical practice, on occasion, in a way that could at best be described as unwise and at worst as highly unprofessional (the Court specifically finds that the allegations contained in the testimony of witnesses Jordan, Morse and Southerland are truthful).

The Court finds that there has been substantial compliance with the rules, regulations and bylaws of the defendant Hospital and that the procedure by which Dr. Bricker was not reappointed, while it may not have been in absolute conformity to the letter of the rules, regulations and bylaws, was adequate in view of all of the circumstances.

The Court finds that there was no requirement under the bylaws, or under general common law, that Dr. Bricker be given a written specification of the charges to be made against him prior to the vote on his reappointment. The Court finds

that Dr. Bricker had ample opportunity at the October 14th meeting to defend himself against the charges made against him.

The Court finds that the action of the Medical Staff and Credentials Committee of the Sceva Speare Memorial Hospital and the Board of Directors of the Hospital in not reappointing Dr. Bricker was neither arbitrary nor capricious and was reasonable under all of the circumstances. The Medical Staff and the Board of Directors of the Hospital have a duty to the citizenry of the Plymouth area to operate the Sceva Speare Memorial Hospital in an efficient and workable manner. The Court finds that they have attempted to exercise this duty to the public and that their actions in the case of Dr. Bricker are reasonable under all of the circumstances in this case.

The petition of Dr. Bricker is therefore dismissed.

This order of the Court is stayed until a hearing may be held before the Supreme Court of the State of New Hampshire to determine the legal issues involved. However, the parties are ordered to begin at once to prepare for such a hearing before the Supreme Court so that a hearing may be held during the June session of the Supreme Court.

It is further ordered that a transcript of this recent hearing be made available to the parties on or before May 22, 1971, assuming the petitioner requests an appeal upon receipt of this decree. It is further ordered that the reserved case and other documents which ordinarily would be printed may be photocopied for forwarding to the Supreme Court. The Court need not remind counsel that the requirements for appeals before the Supreme Court can and should be waived so that the case may be heard during the June session of the Supreme Court.

The Court believes that it is of the utmost importance that this matter be finally resolved at the earliest possible time by a hearing before the Supreme Court; thus the stay of this order has been granted without motion.

RULINGS ON REQUESTS

For the Plaintiff; Findings of Fact:

Granted: 1; 2; 4; 5; 6; 8; 11; 12

Denied: 13

As to Request 3, plaintiff received notice of the meeting but the fact that his reappointment would be considered was not specifically made known to him.

As to Request 7, Dr. Bricker's qualifications were a matter of frequent informal discussion of the Medical Staff and he was made well aware that many of his activities were considered disruptive prior to the August meetings. In short, the matter had been adequately discussed by the Medical Staff and Credentials Committee prior to the August meetings and no lengthy formal discussion was necessary at the August meetings. There was, of course, a discussion on October 14, 1970, with Dr. Bricker in attendance.

As to Request 9, the Court finds that the person receiving Dr. Bricker's requests for specification of charges consciously and positively made the decision to not honor his request; but the Court finds that this decision was not made with the intent to deprive Dr. Bricker of a fair hearing on October 14, 1970.

As to Request 10, if "formal" is defined as written specifications, Dr. Bricker did not receive them. But the

October 14, 1970, meeting lasted from approximately 7:30 p.m. to 11:15 p.m., and the Court finds that this permitted Dr. Bricker ample opportunity to explain his actions which were the cause of his non-reappointment. In addition, his objectionable actions were adequately made known to him by formal and informal discussions with him for a long period prior to this meeting, and these actions were adequately reviewed at this meeting.

For the Plaintiff: Rulings of Law

Granted: 1; 6; 9

Denied: 2; 3; 4; 7; 8

As to Request 5, the Medical Staff and Credentials Committee are one and the same. The Medical Staff and Credentials Committee exercised substantial compliance with the bylaws.

As to Request 10, the defects, if any, of the August meetings were cured by the October 14 meeting, for which he was given due notice. The Court finds that there is no need for specific written charges being presented prior to such a meeting and that, as a practical matter, Dr. Bricker was to a material extent aware of his conduct at the Hospital which his colleagues found objectionable prior to the October 14, 1970 meeting, even though these complaints had not been reduced to the formality of a formal statement of charges.

For the Defendant; Findings of Fact:

Granted: 1; 2; 3; 4; 5; 6; 7; 8; 9; 10; 11; 12; 13; 14; 15; 16; 17; 18; 21; 22; 23; 24; 25

Denied: None

As to requests 19 and 20, the Court finds that it is not unprofessional, as such, to testify in malpractice cases. However, the Court finds that his activities as a Deputy Sheriff, and his involvements therein, did adversely affect his relationship with the Hospital.

For the Defendant; Rulings of Law:

Granted: A; C; D

Denied: None

Request B states the law, subject to the statements contained in Request C.

William R. Johnson
Presiding Justice

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71—462

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

RESPONDENT'S OBJECTION TO CONSIDERATION OF BRIEFS FILED BY AMICI CURIAE

Peter V. Millham, Esq.
101 Court Street
Laconia, New Hampshire 03246
Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

RESPONDENT'S OBJECTION TO CONSIDERATION OF BRIEFS FILED BY AMICI CURIAE

In this case two Briefs have been filed by entities, each claiming it is appearing or seeking to appear as Amicus Curiae. Each Brief is extremely partisan in favor of Dr. Bricker. Your Respondent feels that these Briefs are misleading in that they are not the usual Amici Curiae Briefs, but are the product of a great deal more involvement by Petitioner than would ordinarily be expected.

With respect to the Amici Curiae Briefs it has come to Counsel's attention that both the Town of Ashland Brief and the American College of Legal Medicine Brief were brought to a Laconia, New Hampshire printer by Dr. Bricker, and the printing was paid for by checks drawn on Dr. Bricker's account. The Selectmen of the Town of Ashland were approached by Dr. Bricker or some third person and told that if they would allow a Brief to be filed in the name of the Town there would be no cost to the Town, and they authorized its filing with that condition by the letter attached hereto. The rough draft of this letter was given to the Selectmen by Dr. Bricker.

The Brief of the American College of Legal Medicine was hand carried to my office on November 8, 1971; it was not mailed from Florida. Dr. Bricker is a founder and member of the American College of Legal Medicine and its Brief was filed at his request. The Motion of the American College of Legal Medicine alleges that the consent of Respondent was requested but refused. The only request ever made was by a telephone call from Dr. Bricker to Counsel for Respondent on the night of November 4th. Dr. Bricker's high degree of involvement reveals that this is not the ordinary Amicus Curiae situation.

The facts indicate that the Brief of the Town of Ashland is not the type of Brief that should be granted an exception under Rule 42:4. Further, neither the Brief of the Town of Ashland or the Brief of the American College of Legal Medicine raises any questions of law which are not raised and discussed adequately in those Briefs already filed in Dr. Bricker's name.

Under these circumstances the Respondent prays that the Court deny the Motion of the American College of Legal Medicine for leave to file the Brief, and that the Court not consider the Brief of the Town of Ashland because it does not fall within the spirit of the exception created by Paragraph 4 of Rule 42.

Respectfully submitted,

PETER V. MILLHAM

101 Court Street
Laconia, New Hampshire
03246

November 12, 1971

October 21, 1971

J. Albert Lynch, Esquire
Winer, Lynch, Pillsbury and Howorth
142 Main Street
Nashua, New Hampshire 03060

Glenn W. Bricker v. Sceva Speare Memorial Hospital
Supreme Court of the United States - No. 71–462

Dear Mister Lynch:

On behalf of the Town of Ashland we wish to thank your firm for agreeing to represent the Town in the United States Supreme Court in connection with the above matter.

It is our understanding that it is inappropriate for the firm of Snierson, Chandler and Copithorne, which represented the Town of Ashland in the Supreme and Superior Courts of New Hampshire, to represent the Town in the United States Supreme Court because the firm is appearing for Doctor Bricker.

It is our further understanding that you have agreed to represent the Town of Ashland as a public service, at no expense to the Town. For this we are deeply appreciative.

It is our hope that the appearance and participation of the Town of Ashland as amicus curiae in this case will help to persuade the Court to grant the writ which is being sought.

Very truly yours,
Board of Selectmen

Edward N. Doggett, Chairman

William Norman

Ernest J. Paquette

cc: Snierson Chandler and Copithorne

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71–462

GLENN W. BRICKER
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR THE TOWN OF ASHLAND, NEW HAMPSHIRE, AMICUS CURIAE

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October 26, 1971

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71–462

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR THE TOWN OF ASHLAND, NEW HAMPSHIRE, AMICUS CURIAE

INTEREST OF AMICUS

The Town of Ashland is a political subdivision of the State of New Hampshire, a rural community located in the center of the State, with a population of approximately 1400. It is located about 6 miles from the Town of Plymouth, the location of Respondent. There is no public transportation between the Town of Ashland and the Town of Plymouth. Ashland has only one doctor, Petitioner above, and the nearest hospitals other than Respondent are about 25 miles distant, in the Cities of Franklin and Laconia. Historically, Ashland has had difficulty both in obtaining and in retaining physicians to maintain active practice there. The two physicians who preceded Petitioner in the Town left established practices there to relocate. As is noted in the opinion of the New Hampshire Supreme Court in

the decision from which this appeal is taken, "The Town of Ashland is deprived of effective medical service by the failure of the board to reappoint the plaintiff."

The Town of Ashland has a direct financial interest in the operation of the Respondent, in that the Town at its annual meetings in past years has appropriated and paid to Respondent public funds for general use by Respondent. In addition, the Town has also paid public funds to Respondent for services rendered to Town Welfare recipients.

During the year 1970 the Respondent received $729,823.20 as gross income from services of which the sum of $130,638.35 was received from the United States government for the care of patients under the Medicare Program and an additional sum of $21,894.70 was received from the Federal and State governments for the care of patients who were welfare recipients. In addition thereto the Respondent received approximately $77,000.00 from the United States government under the provisions of the Hill-Burton Act for the construction of a $260,000.00 addition to the facilities during 1970 and 1971.

During the year 1970, 336 residents of your amicus were patients treated in Respondent, many of whom were under the care of the Petitioner. A total of 2235 patients were treated in Respondent in 1970. During the five years preceeding the institution of the within matter, Petitioner annually admitted and treated an average of approximately 250 patients in the Respondent (Exhibit 12).

Your amicus has been granted leave in the Supreme Court in the State of New Hampshire to appear as a friend of that court.

QUESTIONS PRESENTED

1. Is a state chartered hospital which receives twenty percent of its operating funds from federal, state, and local governmental sources; which has in recent years received Federal Hill-Burton Act funds in excess of $75,000.00 representing thirty percent of its current capital expansion program; which is subject to state and federal control of its operating procedures; and which is the sole hospital within a twenty-five mile radius of its location; so linked with state action and the public interest that its proceedings in removing a tenured physician from its staff are subject to the procedural and substantative limitations set forth in the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Did such hospital, in its said proceedings, adhere to the minimum requirements demanded by fairness under such Amendments where those conducting the same consciously refused to give Petitioner, either before or after the hearing upon which the removal decision was based, a statement of the charges which were the bases of the removal proceedings, or of the reasons upon which the decision was reached?

3. Did such hospital, in its said proceedings, act arbitrarily, capriciously and unreasonably, where it failed to follow the requirements of its own by-laws; where it refused, prior to the hearing upon which the removal decision was based, to give Petitioner a statement of the charges which were the basis of the removal proceedings; where its decision was not based upon Petitioner's alleged lack of medical skills or upon alleged moral misconduct adversely affecting his professional qualifications; and where the evidence considered in the course of said proceedings included the fact that Petitioner testified for plaintiffs in malpractice actions?

4. Are the residents of a town served by a staff physician of such hospital denied equal protection of the laws where the decision of such hospital to remove such physician from its staff is based on grounds other than the quality of the care rendered by said physician to his patients in said hospital or said physician's alleged moral misconduct?

STATEMENT OF THE CASE

The Respondent hospital is a voluntary charitable corporation organized and existing under the provisions of Chapter 292 of the New Hampshire Revised Statutes Annotated. As such, it is subject to the control of the State of New Hampshire as to its operating procedures under the provisions of Chapters 151 and 152, New Hampshire Revised Statutes Annotated, and is subject to the control of the State as to certain aspects of its construction programs under the provisions of Chapter 152. It is a recipient of Hill-Burton Act funds under 42 U.S.C. 291, and 30% of the funds used in a recent $260,000.00 building program came from that source. The balance of such building funds came from public contributions. In 1970, the most recent year for which figures are available, 20% of its operating funds came from federal, state and local governments or governmental programs. It is the sole hospital within a 25-mile radius of its location.

The Respondent is governed by a president, vice-president, secretary, treasurer and assistant treasurer, and eighteen other persons, all of whom are denominated "trustees". The day-to-day operation of the hospital is conducted by a professional hospital administrator. Respondent's by-laws provide that appointments to the medical staff are to be made by the board of trustees prior to June 30 of each year, for terms of one year, upon the recommendation of the active medical staff. The active medical staff, sitting as a credentials

committee, is charged with reviewing annually all staff appointments. At the time the within cause of action arose, there were ten active members on the active medical staff, including Petitioner, who had been a staff member since 1963 and an active medical staff member since 1966.

Contrary to the requirements of the by-laws, the annual meeting of the active medical staff in 1970 was not held until August 21. Petitioner received notice of this meeting by postcard, but was hospitalized out of town at the time and unable to attend. The remainder of the active medical staff present at the August 21 meeting recommended re-appointment of all of the active staff except Petitioner. On August 24, the active medical staff, sitting as the credentials committee, again held a meeting. No written notice was given of this meeting to anyone, and Petitioner did not receive oral notice although he was a member of the committee. He was still in an out of town hospital and unable to attend. At this August 24 meeting, the credentials committee voted unanimously not to recommend the reappointment of Petitioner. Petitioner was informed of this decision on August 25, 1970 by Mr. Beaulieu, the hospital administrator.

Petitioner thereafter sought to discover the nature of the charges which were apparently discussed at the August 24 meeting, and the reasons for the decision reached. No list of specified charges was ever made available to him, nor was he ever given any reason for the decision reached on August 24. Petitioner also requested in accordance with the by-laws a hearing before a joint session of the credentials committee and the Joint Conference Committee, which latter body is comprised of the president and vice-president of both the medical staff and the board of trustees, with the hospital administrator a member ex officio. Petitioner's last request was granted and a hearing was held on October 14. All

persons entitled to attend were present, including Petitioner. The meeting concluded without decision. The Respondent's board of trustees met on October 19, and accepted the recommendation then made by the Joint Conference Committee that Petitioner not be reappointed. Petitioner was informed of the fact of, but not the reasons for, this decision on October 20.

Petitioner thereafter immediately sought, pro se, a temporary order, in the New Hampshire Superior Court reinstating him on the staff of Respondent. This request was denied. On appeal from this denial, the New Hampshire Supreme Court returned the action to the Superior Court for hearing, after which hearing a temporary injunction was issued on December 1, 1970. The injunction forestalled Respondent from denying Petitioner the use of its facilities until the disposition of the within cause, and is still in effect. Petitioner has during the period from December 1, 1970, to date, been admitting patients to Respondent, and has performed a number of surgical operations in Respondent using the latter's facilities.

The matter came on for hearing on the merits in May, 1971, and after hearing, the court below on May 17, 1971, dismissed Dr. Bricker's petition to be reinstated to active staff membership at Respondent. On appeal, the New Hampshire Supreme Court affirmed. The within petition is an appeal from the said decision of the New Hampshire Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE NEW HAMPSHIRE SUPREME COURT ERRED BELOW IN REFUSING TO FIND THAT RESPONDENT IS A PUBLIC INSTITUTION.

The record below is replete with evidence that Respondent

is a public rather than a private institution. It is subject to state and federal regulation of its operations under the previously cited New Hampshire and Federal laws. It receives Federal, State and local funds for operating and capital purposes, in that 20% of its operating budget and 30% of its capital budget comes from these sources. It operates in the public interest, has a monopoly on hospital services in its area, and is controlled by trustees who in law and in fact have a fiduciary capacity. More than half of its non-operating income comes from public contributions. As a charitable institution, it receives local, state and federal tax exemptions. These facts are sufficient to support the contention that Respondent is a public hospital, and that the acts of respondent constitute state actions. Chiaffitelli v. Dettmer Hospital, Inc., 437 F. 2d. 429 (C.A., 6th Circuit, 1971); Sosa v. Board of Managers of Val Verde Memorial Hospital. 437 F. 2d 173 (C.A., 5th Circuit, 1970); Meredith v. Allen County War Memorial Hospital, 397 F. 2d 33 (C.A., 6th Circuit, 1968); Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (C.A., 4th Circuit, 1963).

In none of the cases cited by the New Hampshire Supreme Court in support of its finding that Respondent has a private character, is there present that degree of State control set forth in New Hampshire Revised Statutes Annotated, Chapters 151 and 152. The interpretation put on the above facts by the opinion below is strained indeed, and the fictitious dichotomy between a "public" and "private" hospital sought to be preserved by the New Hampshire Supreme Court in the case at bar has no relationship to the realities of the situation as it affects the literally vital interests of the residents of your amicus. Respondent is in fact a public institution, and should be so held by this court.

II. WHERE RESPONDENT IS A PUBLIC INSTITUTION, AND ITS ACTS CONSTITUTE STATE ACTS, RESPONDENT'S PROCEEDINGS IN REMOVING PETITIONER ARE THEREFORE SUBJECT TO THE PROCEDURAL AND SUBSTANTIVE LIMITATIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITION OF THE UNITED STATES.

Chiaffitelli v. Dettmer Hospital, Inc., supra; Sosa v. Board of Managers of Val Verde Memorial Hospital, supra; Sams v. Ohio Valley General Hospital Association, 413 F. 2d 826 (C.A. 4th Circuit, 1969); Meredith v. Allen County War Memorial Hospital, supra; Simkins v. Moses H. Cone Memorial Hospital, supra; Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (D.C. Pa., 1970).

III. RESPONDENT FAILED IN ITS PROCEEDINGS TO REMOVE PETITIONER FROM ITS STAFF TO MEET THE STANDARDS REQUIRED OF STATE ACTION BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The most concise statement of the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution as they apply to hearings of the type at issue here, is set forth in the opinion of Judge Suttle in the District Court opinion in the Sosa case. "(D)ue process requires an applicant be afforded at least the following: (1) Notice of time and place of hearing; (2) a hearing before a properly authorized body; (3) A right to produce evidence and rebut that against him; (4) Consideration and findings as to specific qualifications based upon the evidence submitted; (5) Notification of where and why the applicant fell short, if refused; and (6) an appeal or final opportunity to rebut."

Sosa v. Board of Managers of Val Verde Memorial Hospital _____ F. Supp. _____ (D.C.W.D. Texas, 1970). Petitioner's hearing before the Credentials Committee and the Joint Conference Committee on October 14, 1970, would in the view of your amicus meet the requirements set forth under (1) and (2) above. However, throughout the remainder of the proceedings, Respondent failed to meet even the above "minimum demanded by fairness".

Not being given a list of the charges against him, Petitioner had no effective opportunity to produce and rebut evidence against him. No findings of the Credentials Committee and Joint Conference Committee were ever submitted to Petitioner. No notice was given to Petitioner of where and why he failed to be reappointed. No appeal or opportunity to be heard before Respondent's Board of Trustees was ever granted Petitioner. Thus Respondent has failed to meet four out of the six minimum requirements set forth by Judge Suttle. Failing this, Respondent's actions in failing to reappoint Petitioner should be declared null and void, and Respondent should be ordered to reinstate him to its staff forthwith. Sams v. Ohio Valley General Hospital, supra.

IV. EVEN IF RESPONDENT IS FOUND TO HAVE RETAINED ITS PRIVATE CHARACTER, ITS ACTIONS MAY NOT BE ARBITRARY, CAPRICIOUS OR UNREASONABLE.

See opinion below of the New Hampshire Supreme Court, and cases cited therein.

V. THE COURT BELOW ERRED IN FAILING TO FIND THAT RESPONDENT, IN ITS PROCEEDINGS TO REMOVE PETITIONER FROM ITS STAFF, ACTED ARBITRARILY, CAPRICIOUSLY AND UNREASONABLY.

Your amicus submits that the following acts of respondent, when taken together, show that the entire removal proceedings were arbitrary, capricious and unreasonable:

1. Petitioner was given no notice of the August 24, 1970 meeting at which his reappointment was denied, despite his being a member of the credentials committee.

2. The meeting of August 24 was an extraordinary meeting, held some two months after the period prescribed in Respondent's by-laws for annual credentials committee meetings, yet only oral notice was given to those in attendance.

3. No statement of the reasons for the decision reached at the August 24 meeting was ever given to Petitioner prior to the October 14 hearing before the credentials committee and the Joint Conference Committee.

4. No statement of the charges to be presented at the October 14 hearing was given to Petitioner.

5. Respondent's President stated under oath with reference to the October 14 meeting that "Dr. Bricker, in a phone conversation, at least, asked me what the particular charges were, which I construed to be asking, in a sense, of giving him a list against, for which he could erect a defense, I guess you might say, and this certainly was not my idea of how the meeting should be conducted."

6. Evidence at the October 14 hearing included evidence that Petitioner testifies in medical malpractice cases on behalf of plaintiffs.

7. No evidence of Petitioner's alleged lack of medical competence or moral recitude has ever been adduced at any of Respondent's proceedings.

The foregoing compendium is legally sufficient to make Respondent's proceedings void. Sussman v. Overlook Hospital Ass'n, 95 N.J. Super. 418, 231 A. 2d 389 (1967); Chiaffitelli v. Dettmer Hospital, Inc., supra; Sosa v. Board of Managers of Val Verde Memorial Hospital, supra; Sams v. Ohio Valley General Hospital Association, supra; Meredith v. Allen County War Memorial Hospital, supra.

VI. THE RESIDENTS OF YOUR AMICUS HAVE SUCH A SIGNIFICANT LEGAL INTEREST IN THE WITHIN PROCEEDINGS THAT RESPONDENT SHOULD BE PERMITTED TO DENY THEM FREEDOM OF CHOICE OF THEIR PHYSICIAN AND THE HOSPITAL PRIVILEGES USUALLY APPURTENANT TO SUCH CHOICE, ONLY ON A SHOWING THAT ITS REFUSAL OF STAFF PRIVILEGES TO PETITIONER WAS BASED ON CONSIDERATIONS WHICH AFFECT THE QUALITY OF MEDICAL SERVICE AT RESPONDENT.

42 U.S.C. 291 gives private citizens a right of action to enforce compliance with its provisions. Cook v. Ochsner Foundation Hospital, 319 F. Supp. 603 (D.C.E.D. La., 1970). The citizens of Ashland, New Hampshire, as United States citizens and taxpayers, have a right, therefore, to insist that Respondent as recipient of Hill-Burton Funds, adhere to the letter and spirit of the law which provides those funds. Among these is the concept that all citizens should share to the fullest extent possible in the benefits provided by the Hill-Burton Act, and that Respondent should deny the use of its facilities to Petitioner and those whom he seeks to treat there only upon a showing that medical services at Respondent will suffer because of Petitioner's presence on its active medical staff. The record below is singularly devoid of any showing that Petitioner's presence caused the quality of care at Respondent to deteriorate. Petitioner's medical competence

is fully conceded by all. The most that any of the opinions below could say of his presence was that it was "disruptive". The adjective used in Justice Johnson's opinion is left standing without the support of findings of declining medical care. In the absence of such findings, the Petitioner should be ordered reinstated to Respondent's active staff, with full privileges.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Hampshire.

Respectfully Submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

NO. 71 - 462

GLENN W. BRICKER,
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

BRIEF IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CORRECTIONS TO STATEMENT OF THE CASE

The Petitioner's statement of the case is essentially correct, insofar as it goes, with the following exceptions:

1. The statement of the case and of the issues uses the words "tenure" and "tenured" repeatedly. These words have never been used before in this case.

2. The bylaws do not limit the right of the Board of Directors to reappoint a doctor to the staff on those occasions when the Staff and Credentials Committee have recommended against reappointment. Under the bylaws the Board of Directors could refuse to reappoint a doctor whose reappointment has been recommended by the Medical Staff and the Credentials Committee. In this case, however, the Board of Directors in refusing to reappoint Dr. Bricker was acting in conformity with recommendations of the Staff and Credentials Committee.

3. The Petitioner has indicated that he was given no

statement of the complaints against his conduct, either before or at the hearing conducted by the Joint Conference Committee. While no formal written statement of complaints was given to him, the Trial Court has found that he was given oral notice of the complaints, and that he was aware of them. The Court also found that there was no requirement under the bylaws or under the general common law for a written specification of charges. The Court further found in response to Dr. Bricker's request for findings of fact No. 10 that "The October 14, 1970 meeting lasted from approximately 7:30 p.m. to 11:15 p.m., and the Court finds that this permitted Dr. Bricker ample opportunity to explain his actions which were the cause of his non-reappointment. In addition, his objectionable actions were adequately made known to him by formal and informal discussions with him over a long period prior to this meeting, and these actions were adequately reviewed at this meeting" and further, "The Court finds that Dr. Bricker had ample opportunity at the October 14th meeting to defend himself against all the charges made against him".

4. The Petitioner in his statement of the case indicates that "The Board voted to end the Petitioner's appointment". There was no vote to end the Petitioner's appointment. The vote of the Hospital Board of Trustees was not to reappoint Dr. Bricker since his previous appointment had expired.

5. The statement of the case indicates that certain new matter was presented at the hearing before the Court, over the objection of the Petitioner, which was not presented at the Joint Conference Committee hearing. I have reviewed the transcript of the witnesses Jordan, Colangeli and Morse and find no objections to that testimony. Therefore, I do not feel that it can be fairly stated, if there was any new material

presented in the hearings held before the Court, that timely objection was taken to this evidence by the Petitioner. The earliest claim of any impropriety of this evidence was in Paragraph 8 of the Plaintiff's requests for findings and rulings of law which were submitted several days after the hearing which asked as a matter of law that the Court not consider as bearing on the relief sought by the Plaintiff any charges or complaints against him not made at the October 14th hearing.

6. Petitioner also makes reference to his difficulty in attempts to engage counsel. That matter clearly has nothing to do with this case. Petitioner's personality probably had as much to do with it as anything else. The fact remains that by the second day of hearings on the Temporary Injunction he was represented by competent counsel and continued to be represented by competent counsel throughout the proceedings.

7. In all of the proceedings in this case up until the filing of this Petition for Writ of Certiorari there has never been any claim that the action of the hospital was "State action". There have merely been references to violation of the Petitioner's right of due process and claims that his rights under the Fourteenth Amendment have been violated.

REASONS FOR REFUSING TO GRANT THE WRIT:

I. THE DECISION DOES NOT INVOLVE A FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THE UNITED STATES SUPREME COURT AND WAS DECIDED IN A WAY WHICH WAS PROBABLY IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Petitioner claims that the right of a doctor to utilize the facilities of a non-profit private hospital is a right protected by the Fourteenth Amendment, but cites no United States Supreme Court cases for that proposition. The Supreme Court has spoken on this issue, holding that the right to practice medicine in a particular hospital, even a hospital run by the state or a city, is not a right protected by the Fourteenth Amendment. Hayman v. City of Galveston, 273 U.S. 414 (1927). Another case using reasoning consistent with Hayman, concerning rights protected by due process was Snowden v. Hughes et al, 321 U.S. 1, in which it was held that the right to be elected to a state office is not a right secured by the Fourteenth Amendment. Under these cases the right claimed by Dr. Bricker is not one which is protected by the due process clause of the Fourteenth Amendment, therefore his Petition cannot be maintained.

All of the cases cited by the Petitioner as grounds for application of the Fourteenth Amendment to a private, non-profit hospital are from Circuit Courts of Appeals and involve the equal protection clause of the Fourteenth Amendment. There is no claim of any violation of the equal protection clause by the Petitioner. It is submitted that the equal protection portion of the Fourteenth Amendment is much broader in scope than the due process of law clause, not being limited to cases involving the deprivation of "life, liberty or property". Therefore, it might very well be possible to find a denial of equal protection of the laws in a case which did not involve a deprivation of a right secured under the due process section.

In view of the language of the Hayman and Snowden cases it does not appear that the case as set forth by

Dr. Bricker's Petition is one in which the New Hampshire Supreme Court has rendered a decision within the legal vacuum, or which is contrary to prior decisions of the United States Supreme Court.

II. THE NEW HAMPSHIRE SUPREME COURT USED A PROPER STANDARD TO DETERMINE THE ISSUE.

In its decision the New Hampshire Supreme Court examined the two lines of authority concerning court review of the exclusion of a doctor from privileges in a private hospital and has adopted the evolving more liberal view; that the Courts will review the action of private hospitals to determine that it is not arbitrary, capricious or unreasonable. This was the test the New Hampshire Supreme Court applied in this case.

As far as the notice to Dr. Bricker is concerned, the Trial Court has found that he had actual knowledge of the complaints against him prior to going into the hearing; that at the hearing he had ample opportunity to rebut those complaints and to try to persuade his peers and the two laymembers of the Board of Trustees who were present that he should be reappointed. It is clear from the testimondy of Mr. Wadleigh, President of the Board of Trustees, and Mr. Cayley that they went into the hearing with open minds, hoping that the matter could be resolved and that Dr. Bricker could be reappointed. However, his intransigence and refusal to give any indication that he would try to get along in the future soon dissipated these hopes. The Trial Court has found upon the facts that these were basically fair proceedings; that Dr. Bricker

was given a fair hearing, and that the action of the hospital was neither arbitrary, capricious nor unreasonable. I do not find any decisions of the United States Supreme Court which set any higher standards for a group of volunteer laymen, who are attempting to administer a private charity even though that charity may accept contributions from the public and from government agencies.

III. THE QUESTION OF STATE ACTION WAS NOT RAISED BELOW.

It is a general rule that an Appellate Court will not hear issues which were not raised in the lower Courts. This rule applies equally to the U. S. Supreme Court with reference to Petitions for Writs of Certiorari. Ellis v. Dixon, 349 U.S. 458. Cleveland Etc. RR. Co. v. Cleveland, 235 U.S. 50. In this case the Petitioner has throughout the proceedings made a broad general claim that the proceedings of the hospital were violative of his rights of due process. In his pleadings he indicated that the hospital had received Hill-Burton assistance and donations from towns and private citizens. He has, however, never claimed that the action of the hospital consitituted "state action" such as would bring the action of the hospital within the ambit of the Fourteenth Amendment. He has introduced no evidence on that fact, and asked for no findings or rulings of law to the effect that this constituted State action. The closest that he came was in his first request for rulings of law, and this clearly does not go so far as to request a finding or ruling that the hospital's activities are state activities. He does not attack the issue directly in his brief, although some of the Circuit Court of Appeal cases cited in his brief, in support of his first reason for the granting of the writ, might generally support such an argument.

He cites no U. S. Supreme Court cases in support of the proposition that the action of the hospital constitutes state action. The U. S. Supreme Court has indicated that, even where a city operates a hospital, it is very questionable that the action by the governing authorities of the hospital can be "deemed action of the state". Hayman v. City of Galveston, 273 U.S. 414. It is submitted that the action of non-profit private hospital is not state action. To hold that the action of a non-profit state hospital is state action would lead to the logical conclusion that the action of almost every organization, whether it be business, profit or non-profit, corporate, individual or partnership, could be held to be state action because of the large number of federally financed and state financed programs now extant, which give the state some measure of control over some aspects of every enterprise, whether it be the individual business man or the corporate giant. The Fourteenth Amendment was never intended to extend so far.

IV. TENURE HAS NOT BEEN PREVIOUSLY CLAIMED BY THE PETITIONER.

The Petitioner has never previously claimed that he had rights of "tenure" or that his status was something that was equated to tenure. Doctors are appointed to the staff of the Sceva Speare Memorial Hospital for one year, and they must be reappointed each year if they are to continue to have hospital privileges. There are no statutes known to counsel which would affect this practice. Therefore, it cannot be said that there are any rights of tenure which extend beyond the one year period of appointment. The Petitioner's failure to raise such an issue, prior to his Petition for a Writ of Certiorari, prevents him from raising that issue now. Ellis v.

Dickson, 349 U.S. 458 Cleveland Etc. RR Co. v. Cleveland, 235 U.S. 50.

V. TRIAL COURT'S RECEPTION OF EVIDENCE CONCERNING ALLEGED ADDITIONAL CHARGES WAS NOT OBJECTED TO.

The Petitioner claims that it was a violation of the due process clause of the Fourteenth Amendment for the Trial Court to allow and consider the testimony of witnesses produced by the hospital as examples of the Petitioner's irrational, erratic and questionable behavior as it affects the hospital. The transcript of the testimony at the Berlin hearings on the Temporary Injunction was admitted in evidence at the hearings on the Permanent Injunction by agreement of both parties; therefore Dr. Bricker can have no objection to anything appearing in that testimony. The only other testimony produced by the hospital was the testimony of Louise Jordan, Bernard Colangeli, Sandell Morse and Dr. Kirk. No objection appears in the transcript to any of this evidence except for an occasional objection to portions which might have been considered to be hearsay, which objections were all always sustained. Under the practice in New Hampshire, objections must be taken at the time of the introduction of evidence, or objections are deemed waived. Barlow v. Virrill 88 N.H. 25. The court could, therefore, properly consider such evidence since no timely objection was taken. Further, it is submitted that it is reasonable to accept such evidence to show Dr. Bricker's behavior and personality, since it is the position of the hospital, which has been confirmed by the Courts, that Dr. Bricker's personality, behavior and temperament were detrimental to the interests of the hospital, and adversely affect his medical judgment. These

were not, therefore, additional charges, but illustrations of his behavior. On this issue it might also be pointed out that Dr. Bricker's own behavior in the Courtroom would have been evidence which the Court could consider. His demeanor on the witness stand, his response to questions, his request to be allowed to personally cross-examine Mrs. Morse, his standing at the podium feeding his attorney questions during cross-examination of witnesses all were evidence illustrating some of his behavioral problems, and certainly could be considered by the Court.

VI. EVIDENCE OF MALPRACTICE TESTIMONY WAS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

Dr. Bricker seems to attach far more importance to his "medical legal" activities than either the hospital or the Court. It is clear that the Court gave no weight to any evidence concerning Dr. Bricker's testimony in malpractice issues. It might again be indicated that counsel does not recall any objections being taken to such testimony, all of which was either adduced by questions asked by Dr. Bricker or his counsel, or upon cross-examination of Dr. Bricker. To the extent that the evidence was introduced by the hospital, it was introduced solely to show that Dr. Bricker's total involvement in cases took him away from the hospital at odd hours, and thereby causing him to come into the hospital at odd hours, and thereby causing operational problems in the hospital. However, the Trial Court specifically ignored the evidence concerning his medical malpractice work, and found that it was not unprofessional to testify in malpractice cases. Dr. Bricker commenced this action himself by a Petition for an Injunction. It is, therefore, an

equitable action, and the Court could rightfully hear all evidence concerning the matter before deciding whether the equities lay with Dr. Bricker or with the hospital. The case, therefore, is not a case in which the hospital brought charges against Dr. Bricker in the Courts of New Hampshire, but one in which Dr. Bricker had the burden of persuading the Courts in New Hampshire that equity demanded the relief requested.

VII. THE DIVISION BETWEEN THE HOSPITAL'S HEARING AND DECIDING BODIES HAS NOT BEEN RAISED BEFORE AND WAS NOT VIOLATIVE OF THE FOURTEENTH AMENDMENT.

This question was not raised before the Trial Court and was not raised before the Supreme Court of New Hampshire until after its decision. It was first raised in the Motion for Rehearing filed in August of 1971. It, therefore, is too late to entertain it at this time. There is no requirement in the Fourteenth Amendment that the body exercising the power also be the body which conducts the hearing. Morgan v. United States, 298, U.S. 468 does not state a contrary rule. In that case the statute under which the Secretary of Agriculture purported to act required the hearing to be held before the Secretary of Agriculture. The Assistant Secretary of Agriculture could not hold a hearing and have the order issued by the Secretary of Agriculture since it was contrary to the statute. Therefore this was a denial of due process. In this case there is no statute, rule of law or bylaw which requires the hearing to be held before the Board of Directors. Therefore, the procedure was entirely proper. Further the failure of the Board of Directors to give the reasons for denying his reappointment has never been raised before and cannot be raised now.

CONCLUSION

For these reasons and others obvious to the Court, a Writ of Certiorari should not be issued to review the judgment and opinion of the Supreme Court of New Hampshire.

Respectfully submitted,

PETER V. MILLHAM

101 Court Street,
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October 26, 1971.

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OCTOBER TERM, 1971

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Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

PETITIONER'S REPLY MEMORANDUM

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November 5, 1971

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

GLENN W. BRICKER,
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vs.

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ON PETITION FOR A WRIT OF CERTIORARI
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OF THE STATE OF NEW HAMPSHIRE

PETITIONER'S REPLY MEMORANDUM

I. REPLY TO RESPONDENT'S OBJECTIONS THAT PETITIONER HAS NO CONSTITUTIONAL RIGHT TO PRACTICE MEDICINE AND NO RIGHT TO ASSERT "TENURE" HERE

The ruling in Hayman v. City of Galveston, 273 U.S. 414 (1927) that a physician has no constitutional right to practice his profession at a public facility is not challenged here, despite respondent's suggestion to the contrary.

The distinction between that ruling and the principle that petitioner does assert is parallel to the distinction set forth in Wieman v. Updegraff, 344 U.S. 183 (1952) where, at page 192, the Court said:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Similarly, see Sams v. Ohio Valley General Hosp. Ass'n., 413 F. 2d 959 (C.A., 4th Circuit, 1969) at page 829 and Sosa v. Val Verde Memorial Hospital, 437 F. 2d 173 (C.A., 5th Circuit, 1971) at pages 175-177.

The precise constitutional protections sought by petitioner here do not relate to any abstract right to practice medicine, but are those particular matters of procedural and substantive due process under the Fourteenth Amendment argued on pages 9 through 12 of his Petition for Certiorari.

In the same vein, respondent objects to reference by petitioner to his rights against non-reappointment as "tenure".

Petitioner replies that while he has no absolute right to practice medicine at respondent's hospital nor even such job security as a "tenured" public school teacher may have, he is constitutionally entitled to fair procedures by respondent in acting upon a proposed non-renewal of his staff appointment. These rights are properly characterized on page 4 of his petition as giving "important tenure protection", and "tenure", as used in the petition, means nothing more than this.

In a similar situation, upholding a claim against gross violation of regulations governing the procedures for dismissal of a fireman, the Colorado Supreme Court found the word "tenure" apt to describe the procedural protections. Maulding v. Schmitt, 162 Colo. 337, 339, 426, P. 2d 183, 184 (1967).

II. THE CLAIM OF "STATE ACTION" HAS BEEN FAIRLY RAISED BY PETITIONER THROUGHOUT THE PROCEEDINGS

Respondent claims that the issue has not been adequately raised below as to whether or not by its receipt of Hill-Burton and local municipal grants, its actions are "state action" within the Fourteenth Amendment.

Petitioner replies that receipt of these grants on which he relies to show "state action" by respondent are fully alleged in his second motion to amend petition for injunction (Record: Reserved Case - Second Motion to Amend, January, 1971) and are admitted by respondent's answer thereto (Record: Reserved Case - Answer to Motion to Amend). These allegations were proven by testimony of the witness Beaulieu (Record: Transcript of oral proceedings, May 1971, pages 37-40), and were not controverted. Requests for rulings on this point were made by petitioner to the trial court (Record: Reserved Case - Plaintiff's Requests for Rulings of Law Nos. 1 and 2) and were acted on by that court (Petition for Certiorari, Appendix B, Page 25, granting No. 1 and denying No. 2). Proof of the allegations as to the government grants was assumed by the New Hampshire Supreme Court (Petition for Certiorari, Appendix A, page 16).

III. PETITIONER HAS NOT WAIVED OBJECTIONS TO EVIDENCE OF HIS CONDUCT NOT BROUGHT FORTH AT ADMINISTRATIVE HEARING OR PLEADED IN THE INJUNCTION PROCEEDINGS

Contrary to respondent's claim that petitioner waived all objections to complaints against him first testified to at the hearing on temporary injunction by failure to object to admission of the Transcript (Record: Exhibit 7), petitioner's lawyer expressly reserved his rights to object to immaterial matter therein. (Record: Transcript of Oral Proceedings, May 1971, page 32).

At the hearing on the merits the presiding judge himself established a broad rule of admissibility of evidence by ruling, near the outset, after objection by petitioner to the materiality of medical staff minutes dating back to 1963 (Record: Defendent's Exhibits A-1 and A-2), "in a pro-

ceeding of this type, we are going to have to go into deep as possible to find out all the facts we possibly can . . ." (Record: Transcript of Oral Proceedings, pages 16-18).

Petitioner gave the Trial Court timely opportunity to strike all evidence in Exhibit 7 and at hearing on the merits relative to complaints not charged against petitioner at the administrative hearing. (Record: Reserved Case - Plaintiff's Request for Rulings of Law No. 8). See Douglas v. Alabama, 380 U.S. 415 (1965), where at pages 422-423 this Court said:

> "In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."

Request No. 8 was ruled on by the Trial Court (Petition for Certiorari, Exhibit B, page 25) and was later brought to the attention of both the Superior and Supreme Courts of New Hampshire by petitioner's various motions for new trial and remand (Record: Reserved Case - Motion for New Trial, May 25, 1971; Motion to Remand, June 1, 1971; and Second Motion to Remand, August 9, 1971).

IV. SIGNIFICANCE IN THESE PROCEEDINGS OF RESPONDENT'S IMPROPER OBJECTIONS TO PETITIONER'S MALPRACTICE TESTIMONY

Respondent makes the completely erroneous claim on pages 9 and 10 of its Brief in Opposition that it was petitioner who injected respondent's objections to his malpractice testimony into this litigation, and it further claims that it only objected to this activity because it supposedly kept petitioner away from his duties on respondent's

medical staff.

On the contrary, petitioner did not specifically raise this issue in his original or amended petition for injunction. It is first found in his answers to pointed questions from the court at the hearing on temporary injunction (Record: Exhibit 7, pages 16-17 and 105-108), and was then avidly followed in respondent's lawyer's cross examination of him (Record: Exhibit 7, pages 123-142).

In the direct examination of respondent's witness Pascoe Roberts (Record: Exhibit 7, pages 244-245), petitioner's malpractice testimony and other medical-legal activities were complained of, and on cross examination Mr. Roberts readily agreed that it was the annoyance to the other staff doctors, and not petitioner's absence from his duties, that made such testimony objectionable. Further, he said that respondent's directors had established a policy against such testimony by petitioner. (Record: Exhibit 7, pages 250-252). The same point was made even more emphatically by respondent's president Wadleigh in his deposition (Record: Exhibit 10, direct examination, pages 12-13, and cross examination, pages 37-42), and in testimony of respondent's witness Dr. Johnson (Record: Exhibit 7, pages 180-182).

CONCLUSION

Since respondent has failed to meet squarely the basic constitutional question presented (Petition for Certiorari, Reason I, pages 9-11), attempting to conceal itself behind the undisputed but inapplicable holding in Hayman v. City of Galveston, 273, U.S. 414 (1927) and the action of

the New Hampshire Supreme Court in seeking support in state grounds which directly conflict with federal rights, petitioner submits that the need for plenary review of the decision below is indisputable. In fact, petitioner suggests that summary reversal is in order.

Respectfully submitted,

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November 5, 1971

SUPREME COURT, U. S.

MOTION FILED

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ON PETITION FOR A WRIT OF CERTIORARI
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MOTION OF AMERICAN COLLEGE OF LEGAL MEDICINE FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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November 8, 1971

IN THE
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MOTION OF AMERICAN COLLEGE OF LEGAL MEDICINE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American College of Legal Medicine hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The American College of Legal Medicine is the national medical organization that fulfills the role in relation to the specialty of Legal Medicine that the American College of Surgeons, American College of Cardiology and American College of Radiology (to cite a few) fulfill in relation to their respective disciplines.

With the exception of six Honorary Fellows, the 182 members of the College are Doctors of Medicine, of whom 132 also hold a professional law degree.

In the case at bar, the fact that petitioner, whose competence as a physician and surgeon is undisputed, devoted a portion of his time to the practice of Legal Medicine, serving as a deputy sheriff, medico-legal consultant to the Grafton County Attorney, accident investigator for the Federal Aviation Administration, and on rare occasions testified for plaintiffs in medical malpractice cases was accepted by respondent as a substantial charge against him in arriving at the decision to terminate petitioner's medical staff affiliation.

The Trial Court was requested by respondent to find as fact that some if not all of these activities entered into by petitioner were not in the best interest of the respondent, and the Court so found. (Certified Record, Reserved Case - Defendant's Requests for Findings of Fact Nos. 19 and 20)

This unprecedented action by the Trial Court which was sustained by the New Hampshire Supreme Court has the effect of condoning a gross infringement upon the petitioner's right of free speech in violation of the First Amendment of the Constitution of the United States.

The petitioner treated this constitutional question as a subsidiary matter whereas it is in fact central to the case.

To allow this precedent setting decision to stand will have the effect of serving notice upon the members of the medical profession that this Honorable Court permits and condones the untenable situation wherein plaintiffs in medical malpractice actions find it extremely difficult, if not impossible, to obtain medical expert testimony in meritorious cases. The adverse ramifications upon our society of such a philosophy are obvious.

If the argument of your amicus is accepted, it would be dispositive of this case.

Respectfully submitted,

LAWRENCE V. HASTINGS

November 8, 1971

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BRIEF FOR AMERICAN COLLEGE
OF LEGAL MEDICINE, AMICUS CURIAE

INTEREST OF AMICUS

The interest of your amicus is set forth in the motion to which this brief is attached.

QUESTION PRESENTED

Is a physician who is a staff member at a hospital which receives substantial government assistance under the Hill-Burton Act and from local governments denied rights secured to him under the First, Fifth, and Fourteenth Amendments of the Constitution of the United States when the hospital, in proceedings for the non-renewal of his staff membership, receives as evidence against him testimony and other information that he is active in the field of Legal Medicine and as an expert witness in medical malpractice cases?

STATEMENT OF THE CASE

The case has been adequately stated in the Petition for Writ Of Certiorari To The Supreme Court Of The State Of New Hampshire.

REASON FOR GRANTING THE WRIT

Your amicus adopts and supports the second Reason For Granting The Writ set forth on pages 11 and 12 of the Petition For Writ Of Certiorari.

The answer to the question presented in this brief must be "Yes". The respondent's discrimination against the petitioner because of his activities in the field of Legal Medicine and the fact that he testified in medical malpractice cases is an infringement upon his personal right to practice his profession and express his professional opinion before the courts of the land. The petitioner is, as a result of the action by respondent and the courts, unfairly and unjustly classified in violation of the Fourteenth Amendment. (See Sams v. Ohio Valley General Hospital Association, 413 F. 2d 826 (C.A. 4th Circuit, 1969)

The powerful arguments of public policy against any practices tending toward intimidation of witnesses generally and expert witnesses for plaintiffs in medical malpractice cases particularly, are well summarized in L'Orange v. Medical Protective Company, 394 F. 2d 57 (C.A. 6th Circuit, 1968) at pages 60-63.

Respondent's actions are akin to the crime of influencing a witness not to testify. 18 U.S.C.A. § 1503.

It should also be noted that a lawyer who attempts to do what respondent pursues as a matter of policy (See testimony of respondent's witness Pascoe Roberts; Certified Record, Exhibit 7, page 251) would be subject to censure or even disbarment. 7 Am Jur 2d, Attorneys at Law, Section 27. Code of Professional Responsibility of

the American Bar Association, Canon 7, Ethical Consideration 7-27, Disciplinary Rule 7-109 (A) and (B), and note 89.

CONCLUSION

For reasons of basic fairness and the orderly administration of justice in the courts, the important issues clearly raised by the Petition herein merits the review of the judgment of the Supreme Court of the State of New Hampshire.

Respectfully Submitted,

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